THE EMPLOYER'S ADVISORY

A QUARTERLY NEWSLETTER
HIGHLIGHTING CURRENT EMPLOYMENT LAW ISSUES
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RESOLUTIONS FOR 2016

It's that time of year again. Time for winter driving, sunsets at 5:00 p.m., the countdown to spring training, and, of course, New Year's Resolutions. So, to join in this long-standing tradition, the Employer's Advisory created the following eight resolutions, in no particular order:

#8. Make sure a State of Colorado Affirmation Form is completed for all newly-hired employees. While the I-9 Form gets all the press, Colorado has its own State Affirmation Form that employers must complete within 20 days of hiring a new employee. This form should not be kept in an employee's personnel file and also should be kept in separate files from the I-9 Form.

#7. Make sure job descriptions accurately describe a employee's duties. Job descriptions convey to employees what they should be accomplishing, are they are invaluable in identifying to the EEOC, courts, unemployment, etc. what the employer considers to be the essential functions of the position.

#6. Make sure supervisors receive training regarding the organization's policies and procedures. Do your supervisors understand the finer points of the Americans with Disabilities Act? Do they understand that unlawful harassment and discrimination claims are not limited to sex, but can include religion, age, race, ethnicity, genetic information, disability, and marital status? Do they understand when a subordinate becomes eligible for FMLA leave? These are just a few examples of training that supervisors should receive from organizations.

#5. Document an employee's performance with written reprimands. Identify in a straight-forward manner what rule, procedure, etc. the employee violated, the date the violation occurred, and what the employee needs to do to improve. And try to stay away from speculating as to "why" something occurred, just focus on "what" has occurred.

#4. Prepare accurate performance evaluations. Reviews given to motivate employees, mask performance issues, etc. only result in a positive record that an employee can use to the employee's advantage in litigation. Instead, performance evaluations should accurately describe performance.

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#3. Ensure your organization's harassment and discrimination policy contains an effective and lawful complaint procedure. One of the best defenses to these harassment claims is that an employer has a well-documented anti-harassment policy and complaint procedure that is conveyed to every employee.

#2. Treat every e-mail as though it could be "Jury Exhibit #1." Many people look at e-mails as more "casual" than documents, letters, etc. But they aren't. Further, hitting that "delete" button doesn't erase the e-mail from the system; it can be discovered years later. All employees within your organization should be advised to read and write e-mails from this perspective.

#1. Si sus trabajadores hablan varios idiomas, las políticas de la compañía deben estar en varios idiomas. If you didn't understand that, perhaps you shouldn't expect employees who predominantly speak Spanish to understand the organization's English-only policies. In short, consider having your key employment policies (*e.g.,* at-will employment, discrimination and harassment, Family and Medical Leave Act, etc.) translated into Spanish for workers that predominantly speak Spanish.

NEW REQUIREMENTS IN THE NEW YEAR FOR NEW (AND OLD!) FEDERAL CONTRACTORS

As we prepare for 2016, federal contractors, or those employers who anticipate obtaining a federal contract in the new year, should take special note regarding a recent OFCCP final order. As of January 11, 2016, federal contractors/subcontractors are prohibited from discriminating against, not hiring, or discharging an employee or applicant because that employee or applicant inquires about, discusses, or discloses her own compensation information or the information of another employee or applicant.

This rule applies to all new or modified contracts entered into on or after January 11, 2016, if any of the following are true: (1) the contract is a single federal contract or subcontract over $10,000; (2) if the contract is a construction contract over $10,000; (3) if the company has multiple federal contracts and/or subcontracts that together total more than $10,000 in a year; or (4) if the company has a government bill of lading, is a federal fund depository, or issues and pays U.S. savings bonds and notes.

Importantly, this rule defines "compensation" in extremely broad terms. Compensation includes "salary, wages, overtime pay, shift differentials, bonuses, commissions, vacation and holiday pay, allowances, insurance and other benefits, stock options and awards, profit sharing, and retirement." This does not mean that companies must affirmatively share such information among all employees. Rather, the rule protects employees or applicants who share their own or others' information about "compensation."

There are exceptions. For example, an employee who has access to employees' and applicants' compensation information as "a part of such employee's essential job functions" cannot disclose those employees' or applicants' compensation information unless certain situations arise, such as a complaint, charge, investigation, etc. But according to the OFCCP, this employee is protected if, for example, he/she discusses or discloses his/her own compensation information or discusses other employees' or applicants' information with the company's managers or to make a complaint.

Of course, the Federal Department of Labor already takes the position that employees may discuss their pay under the Fair Labor Standards Act. The National Labor Relations Act also protects non-supervisory employees who discuss compensation amongst themselves. Similarly, Colorado law further protects employees "or other person[s]" who engage in wage or compensation communications. So, there are protections for employers not covered by the OFCCP's rules

In addition to this discrimination prohibition, the OFCCP's final rule requires covered contractors and subcontractors to post certain information. To meet this requirement, the OFCCP issued new equal opportunity language that contractors *must include* in their affected contracts and subcontracts. The OFCCP also published a new handbook provision for affected contractors and subcontractors that it requires all contractors and subcontractors to incorporate into their existing handbooks. Additionally, the OFCCP published a new poster that affected contractors and subcontractors must post in the workplace. Finally, updated language covering this new protection must also be included in affected contractors' and subcontractors' job advertisements and inform labor unions or other representative group of the contractors' or subcontractors' requirements by sending a notice.

Practical Tip. First, determine if your organization is covered by this rule. If so, your organization should immediately implement the new policies and rule changes mandated by the OFCCP. After all, a government audit on these issues is not quite as fun as it sounds.

Prepare Now For January 1, 2017!
Federal contractors also must plan to provide paid sick leave for employees starting on January 1, 2017. The new rule states that employees must earn at least one hour of paid sick leave for every 30 hours worked. Any cap on total paid sick leave cannot be less than 56 hours. *Watch for more information in future issues of The Employer's Advisory*.

THE AFFORDABLE CARE ACT – THEN IS NOW

President Obama signed The Patient Protection and Affordable Care Act ("ACA") into law in March 2010. Back in those days of panic, many took solace in the fact that various deadlines were in a galaxy far, far away. To borrow an old maxim "Why worry about it today, if you can push that concern off a few days or years." Unfortunately, that time is now, and 2016 rings in those challenges.

First, in 2016 the annual tax penalty to an individual who does not maintain health insurance increases to the statutory maximum of $695. Increases in future years are indexed to inflation.

Second, the "employer mandate" took effect in 2015 for employers with 100 or more employees, and now takes effect in 2016 for employers with 50 or more employees.

As you know, the ACA breaks employers into two classifications: small employers and large employers. So, employers with 50 to 99 employees are considered "small" employers and need to meet minimum requirements for small group employer health plans. But employers with 50 to 99 employees are also considered "applicable large

employers" (ALEs), facing heightened IRS reporting responsibilities and employer shared responsibility penalties for failing to offer adequate coverage. For example, in 2016 ALEs (employers with 50 or more full-time or full-time equivalent employees) that (1) don't provide coverage, (2) provide coverage that doesn't offer minimum value, or (3) provide coverage that is unaffordable, must make a per-employee, per-month employer shared responsibility payment."

But employers with less than 100 employees are still "small employers" for purposes of transition policies. Therefore, individuals and small employers may keep their non-ACA compliant coverage for policy years that begin before October 1, 2016.

Third, ALEs must report ACA information to both the IRS (Form 1094) and their employees (Form 1095).

So, you may wonder is there good news for employers this year? Glad you asked; because there is. On December 28, 2015, the IRS sent out a belated Christmas present to employers and other plan sponsors when it announced it was delaying the 2016 Affordable Care Act reporting requirements. In Notice 2016-4 the IRS announced that the deadline for providing employees Form 1095 is delayed from February 1 to March 31, 2016. Similarly, the deadline for filing Form 1094 with the IRS is delayed from February 29 to May 31, 2016 for non-electronic filers and from March 31 to June 30, 2016 for electronic filers.

Practice Point: IRS Forms 1094 and 1095 are time-consuming and require considerable effort. So ALEs should be gathering information to meet these deadlines. ALEs should also note that multiple versions of each form exist. So be sure to use the one appropriate to your business. See IRS Publication 5196, available at www.irs.gov.

Finally, while not new, some often-overlooked relief is available to small employers. An employer with fewer than 25 employees who contributes at least 50% of the premium cost for employees to obtain coverage under a qualified health plan through the Small Business Health Options Program (SHOP Marketplace) qualifies for tax credits. This includes Colorado's Connect for Health Colorado.

And businesses with 51 to 100 FTE employees can use the Small Business Health SHOP Marketplace to purchase health care plans for employees. Prior to this date, the SHOP Marketplace was available only to businesses with 50 or less FTE employees.

So now is the time to compile reporting information if you have 50 or more employees and to research your options for saving money on health insurance plans for employers of all sizes.

THE NATIONAL LABOR RELATIONS BOARD AND EMPLOYEE HANDBOOKS

It seems that hardly a day goes by without the National Labor Relations Board (NLRB) reminding employers that while the Board has traditionally involved itself in union activities, "the times, they are a-changin'". To that end, the NLRB has been issuing opinions concerning employee handbook policies that it doesn't like. For example:

1. *Policies that restrict photos/ recordings*. The NLRB opines that employers may not have policies that ban employees from taking

photos or making recordings on company property; though, a policy may limit the scope of such a prohibition depending on protective rights (such as a healthcare facility protecting patient privacy by limiting photos of patients).

2. *Policies that restrict employees from leaving work.* The NLRB believes these policies may be unlawful because employees have the right to strike. So, the Board takes the position that a policy stating that failure to report for a scheduled shift or leaving early without permission as grounds for discipline for personal gain will likely be unlawful if it restricts an employee from walking out in protest of an employer policy.

3. *Policies regarding conflict of interests.* The Board takes a harsh view toward policies that ban "any activity" that is in "conflict" with the "company's best interest." After all, reporting to the EEOC is, technically, in conflict with the employer. But policies defining "conflicting" activities, like restricting employees from financial ownership in a customer, supplier, or competitor, will likely be lawful.

4. *Policies regarding conduct toward fellow employees.* The Board does not like policies that prohibit "all" negative, derogatory, etc. conduct because the Board believes they may prohibit an employee's right to argue and debate with each other about workplace issues. But employers may implement lawful policies that require employees to treat each other professionally and with respect and ban unlawfully harassing conduct.

5. *Policies regarding an employee's interaction with third parties*. The Board will treat policies that ban employees from talking to the media or government agencies as unlawful because they, according to the Board, prohibit employees from reporting workplace concerns to administrative agencies. But employers may enact a policy noting that employees are not authorized to speak on behalf of the company without authorization.

Practical Tip. Employers should review their handbooks to ensure they don't violate any of the above concerns.

CHANGES TO COLORADO'S MINIMUM WAGE

Colorado's Division of Labor has adopted Colorado Minimum Wage Order 32 to reflect the new state minimum wage of $8.31 per hour, effective January 1, 2016, up from $8.23 last year. The tipped employee wage also increased to $5.29. Colorado's constitution requires that the Colorado minimum wage be adjusted annually for inflation, as measured by the Consumer Price Index used for Colorado, and states that no more than $3.02 per hour in tip income may be used to offset the minimum wage of tipped employees.

State lawmakers will be back to work on Wednesday, January 13. So, we'll keep you posted on the going-ons at the capitol.

WCHRA SPRING CONFERENCE: BECAUSE IT'S NEVER TOO EARLY TO PLAN AHEAD

Sure, it's still January. But it's never too early to plan ahead to attend the Western Colorado Human Resources Association's Spring Conference. This year the Conference will be held on April 20th.

Q & A

Q. Our company offers insurance benefits to employees' spouses. Bob wants to add his long-time same-sex significant other to his insurance coverage. Do we have Bob complete the same Declaration of Common- Law Marriage that we have used in the past?

A. Colorado statute guarantees parties to a civil union the same rights and benefits as spouses, including insurance coverage. But a relationship between two people does not become either a marriage or a civil union simply by virtue of its long duration. In Colorado, persons enter into a common-law marriage by (1) holding themselves out as husband and wife; (2) consenting to the marriage; (3) living together; and (4) having the reputation in the community as being married. Same-sex partners may enter into common-law marriage or ceremonial marriages. But employees seeking to obtain benefits by declaring themselves to be "common-law married" should remember that a common-law marriage is as binding as a ceremonial marriage; only death or divorce ends it.

Q. I've been reading a lot of articles lately about how employees in the millennial generation tend to expect frequent recognition for their achievements in the workplace. How worried do I need to be that our millennial employees may bring an age-discrimination claim if we promote an older employee instead of a millennial?

A. You don't need to be overly concerned about age claims, although your worries may not end there. Generally, the millennial generation is defined as those employees born between the early 1980s and the early 2000s. So, millennial employees range in age from teenagers to those around age 35. The state and federal discrimination laws regarding age protect only those workers age 40 and older. So, the oldest millennial employees are still around five years away from entering the protected class covered by age discrimination laws. Since millennial employees currently are not in the protected class for age discrimination purposes, they would have no recourse for age discrimination complaints. Of course, that doesn't mean that millennial employees are not covered under other protected classes, like sex, race, etc. So while millennial employees may not currently be able to succeed under an age discrimination claim, they may succeed under another protected class or under another theory altogether, so be sure to listen to and handle employee complaints from millennial employees just as you do for all employees.

Q. I've read a bunch of articles recently about the Colorado Department of Labor saying that use-it-or-lose-vacation policies are both lawful and unlawful. Which is it?

A. Yes, the State Department of Labor has certainly been in the news recently regarding this issue. Initially, employers should remember that the State DOL's announcement are not "law," but simply, it is their opinion on this issue, which may not be binding in a court. And while the DOL has been issuing seemingly conflicting opinions recently, in the end, it reiterated what the law currently says. That is, accrued vacation must be treated like wages. So, once earned, it can't be taken away unless there's an agreement between the employee and the employer to the contrary. Employers should be cautious to declare their handbook "an agreement" since the first page probably states, specifically, it's not an agreement. Further, entering into an agreement with your employees may also cause problems because a true agreement can't be modified by one party.